for The Defense

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Delivering America's Promise of Justice for All

for The Defense

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The Role of Advisory Counsel

By Paul J. Prato, Attorney Manager, Adult Trial Division

At some point during the career of a public defender, he or she may be called upon to act as advisory or standby counsel for a *pro se* defendant.[1] Most likely the defendant will have no legal training, may have a strong distrust of public defenders, and may be totally uncooperative. Yet, advisory counsel is ethically required to fulfill the advisory counsel role in a competent manner, exercising the degree of "thoroughness and preparation reasonably necessary for the representation."[2] To make matters even more interesting advisory counsel must always be mindful that at any moment he or she may be called upon by the defendant[3] or by the court[4] to step in and assume representation.

This practice pointer examines the case law defining the advisory counsel role, and offers some suggestions for working with the *pro se* defendant that may make the experience less stressful than it might otherwise be.

Constitutional Right of Self-Representation

In *Faretta v. California* the Court held that a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so.[5] The Arizona Constitution provides for the right of self-representation as well.[6] This right, however, is not absolute, just as the right to counsel is not absolute. The court maintains the discretionary power to terminate the right of self-representation if the *pro se* defendant engages in "deliberate serious and obstructionist misconduct[.]"[7] The court also has the discretionary power, in extreme and severe cases of misconduct, to find that the defendant has forfeited his or her right to counsel and order that the defendant proceed without counsel.[8] Although a defendant has a constitutional right to self-representation, the trial court, without infringing on the right of self-representation, has the inherent discretionary power to appoint counsel, even over the defendant's objection, to act as an advisor for the defendant and to standby prepared to assume representation should the need arise.[9]

McKaskle v. Wiggins

The specific rights reserved to the *pro se* defendant and the parameters of advisory counsel's participation are discussed in *McKaskle v. Wiggins*.[10] The rights of the *pro se* defendant are encapsulated in the Court's holding that "[t]he *pro se* defendant must be allowed to control the organization

and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial."[11] To protect these rights and to ensure against destroying the jury's perception that the defendant is representing himself or herself, advisory counsel may not, without the acquiescence of the defendant, make or substantially interfere with any significant tactical decisions, control the questioning of witnesses, or speak instead of the defendant on any matter of importance.[12] Specifically, in the presence of the jury, advisory counsel must avoid "excessive involvement" that might "destroy the appearance that the defendant is acting *pro se*[.][13] These are the guiding principles for advisory counsel.

Advisory counsel's participation in pre-trial proceedings and in trial proceedings conducted outside the jury's presence is less restrictive than in proceedings conducted before the jury. In proceedings conducted outside the jury's presence, advisory counsel has freer reign to offer unsolicited advice, without infringing upon the right of self-representation. It is important, however, that the defendant be allowed to address the court freely on his or her own behalf and that disagreements between advisory counsel and the defendant are resolved in the defendant's favor if the matters are ones that are normally left to the discretion of counsel.[14] Advisory counsel may, without infringing on the right of self-representation, assist the defendant in understanding and following basic rules of courtroom protocol and "assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals."[15]

Waiver of the Right of Self-Representation

The *pro se* defendant may waive a previously asserted right of self-representation at any time; however, if this occurs "[t]he defendant will not be entitled to repeat any proceedings previously held or waived solely on the grounds of the subsequent appointment of counsel."[16] For a waiver to be effective it must be unequivocal.[17] In *State v. Rickman* the defendant's request, on the day of trial, that advisory counsel take a "more active role" in the proceedings was denied as not being an "unequivocal" waiver of the right of self-representation; instead it was interpreted as a request for hybrid representation which is not a recognized constitutional right in Arizona, although it is within the discretion of the trial court to permit.[18] Hybrid representation occurs when a defendant represents himself *pro se* and is also represented by counsel. It "differs from advisory representation where counsel only gives a *pro se* defendant technical assistance in the courtroom, but the attorney does not participate in the actual conduct of the trial."[19]

Working with the Pro Se Defendant

The most difficult part of being advisory counsel is loss of control over management of the case. This experience need not be as painful as it might otherwise be if advisory counsel is able to establish a degree of rapport with the defendant. A first step in achieving this goal is to accept and respect the defendant's choice of self-representation. When first meeting with the defendant, advisory counsel should discuss with the defendant how counsel's knowledge and experience can best be used for the defendant's benefit. Advisory counsel should take this opportunity to establish agreed upon ground rules for advisory counsel's participation (e.g., does the defendant want advisory counsel to provide advice only when asked, or does the defendant want advisory counsel to offer suggestions whenever he believes that the defendant may be heading in a dangerous direction).

Early on following appointment as advisory counsel, counsel should write a letter to the defendant highlighting defendant's rights under the case law and the parameters of what advisory counsel may and may not do. A sample letter is available on our website at http://www.pubdef.maricopa.gov/newsletter/fTDlinks/fTDlinks.htm. It should be made clear in the letter that advisory counsel is not responsible for drafting motions, doing legal research, or conducting investigation in the case. If the assistance of a paralegal, investigator or other support staff services is needed, it is the defendant's responsibility to ask the court to appoint the appropriate person.

It may be helpful to explain in the letter that the role of advisory counsel is that of a technical consultant, much like the technical consultant to the making of a movie. Just as the director of the movie has the final say as to what goes into the movie, the *pro se* defendant has the final say on how the defense case is managed. It should be clearly stated in the letter that the final say on tactical decisions, and any other decision that is usually made by counsel, rests solely with the defendant. It should also be made unmistakably clear that the *pro se* defendant is free to ask for and follow or ignore any advice given.

It is important to make clear to the *pro* se defendant that he or she is governed by and must adhere to the *Arizona Rules of Criminal Procedure* and the *Arizona Rules of Evidence,* just as counsel is governed by and must adhere to these rules.[20] It should be clearly explained that the trial judge is charged with the responsibility for maintaining an orderly courtroom and enforcing courtroom rules of procedure and evidence. In fulfilling this responsibility the judge has the right to balance the defendant's right of self-representation against the need that the trial be conducted in a "judicious, orderly fashion [.]"[21] An example of this is that the judge may require the defendant to present his testimony through questions asked by advisory counsel, instead of by narrative testimony from the defendant or by the defendant asking himself questions.[22]

It should also be made clear to the *pro se* defendant that if he engages in "deliberate serious and obstructionist misconduct" the trial judge has the power to terminate his right to self-representation.[23] And if after being warned the defendant continues to engage in "disorderly, disruptive, and disrespectful" behavior, the trial judge has the power to remove the defendant from the courtroom, while the trial continues *in absentia*. The defendant will be allowed to return only after agreeing to act appropriately.[24] The letter should explain that while advisory counsel has no reason to believe that the defendant will act inappropriately, the advice is being given to illustrate how advisory counsel can help the defendant avoid problems.

It is especially important to emphasize to the *pro se* defendant that by electing self-representation, any claims of ineffective assistance of counsel are waived, as he cannot allege his own ineffectiveness.[25] In other words, if he commits, invites, or permits a trial error to occur, a claim of ineffective assistance of counsel will not be available.

It should be made clear in the letter that if at some point the defendant waives the right of self-representation or the court orders, for whatever reason, advisory counsel to step in and assume representation, that advisory counsel is "not entitled to repeat any proceedings previously held or waived solely on the grounds" advisory counsel has assumed the responsibility for representation.[26] So, if the defendant is planning on waiving the right of self-representation at some point in the proceedings after achieving a desired goal, sooner is better than later.

Shortly after mailing the letter to the defendant, advisory counsel should meet, in person (not by video), with the defendant to carefully review the letter, answering any questions the defendant may have. During this discussion, and in all discussions with the defendant, advisory counsel must make a genuine and patient effort to *listen*. Listening is a sign of advisory counsel's respect. Keeping the defendant informed, using both personal contact and written communication, are also signs of respect. If advisory counsel exhibits respect for the defendant, the client will be more likely to trust counsel and the advice offered. It may ultimately result in the *pro se* defendant waiving the right of self-representation while there is still time to adequately prepare a defense.

Short of this ideal outcome, establishing a workable relationship with the *pro se* defendant may result in him taking advisory counsel's advice, which in turn may prevent unnecessary damage to the defense case. Minimizing unnecessary damage will make advisory counsel's task a bit easier should he be required to assume representation either on the eve of trial or at some inopportune point in the trial.

Conclusion

The law regarding the responsibilities of advisory counsel is straightforward. If advisory counsel does not interfere with the defendant's management of the case the requirements of *Faretta* and *McKaskle* will be satisfied. And, if advisory counsel is able to establish a working relationship with the defendant by exhibiting respect for the self-representation decision, the experience will be less stressful than it might otherwise be.

(Endnotes)

1. The United States Supreme Court uses the term "standby" counsel in its decisions while the Arizona appellate and trial courts use the term "advisory" counsel. The terms are synonymous. Counsel acts in an advisory role to the *pro se* defendant until, and unless, called upon to assume representation. In the practice pointer the term "advisory" counsel will be used except in quotations that use the term "standby" counsel.
2. ER 1.1, *Arizona Rules of Professional Conduct*. *See also, "*Appointed Counsel's Relationship to a Person Who Declines to be Represented." *ABA Formal Opinion 07-448* (October 20, 2007).
3. Rule 6.1 (e), *Arizona Rules of Criminal Procedure*.
4. *Faretta v. California, 422* U.S, 806, 835, FN46, 95 S.Ct. 2525, 2541 (1975).
5. *Id*.
6. Art. 2, § 24, *Ariz. Const.*
7. *Faretta*, *supra*.
8. *State v. Hampton*, 208 Ariz. 241, 92 P.3d 871 (2004); *State v. Rasul*, 167 P.3d 1286, 2CA-CR 1995-0014, (App. 2007).
9. *Faretta, supra* at 835, fn46, 95 S.Ct. at 2541. *See also* Rule 6.1 (c), *Arizona Rules of Criminal Procedure*.
10. 465 U.S. 168, 104 S.Ct. 944, (1984).
11. Id., at 174, 104 S.Ct. at 944, 949.
12. *Id.,* at 178, 104 S.Ct. at 951.
13. *Id.,* at 181-182, 104 S.Ct. at 953.
14. *Id.,* at 180, 104 S.Ct. at 951.
15. *Id., at 184, 104 S.Ct. at 954.*
16. Rule 6.1(c), *Arizona Rules of Criminal Procedure.*
17. *State v. Rickman,* 148 Ariz. 499, 503-504 715 P.2d 752, 756-757(1986
18. *Id; State v. Roscoe*, 184 Ariz. 484, 498, 910 P.2d 635 (1996).
19. *Id.,* at FN 1, 715 P.2d at 757 FN 1.
20. *See*, *Faretta, supra* at 835, FN 46, 95 S.Ct. at 2541, and FN 46.
21. *State v. Wassenaar*, 215 Ariz. 565, 161 P.3d 608, 616 ¶¶ 26-29 (2007).
22. *Id*.
23. *Faretta*, *supra.*
24. *Illinois v. Allen*, 397 U.S. 337, 343, 90 S.Ct. 1057, 1060-61 (1970).
25. *Faretta, supra*.
26. Rule 6.1 (c), *Arizona Rules of Criminal Procedure*.

When is Resisting NOT Resisting?

The Ins and Outs of Resisting Arrest

By Russell B. Richelsoph, Attorney at Law, Richelsoph Law Office, PC, updated by Jeff Roth, Defender Attorney and Extern Coordinator

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Resisting arrest sounds like a pretty simple crime. The name seems to say it all: if a person resists an arrest, they commit the crime of resisting arrest. Based on this simplistic and intuitive analysis, many of us have convinced our clients to take plea agreements without properly evaluating our client's chances of success at trial. Resisting arrest actually requires a much more complicated factual analysis. To do this, let's first look at the actual statute:

> A person commits resisting arrest by *intentionally* preventing or attempting to prevent a person reasonably known to him to be a peace officer, acting under color of such peace officer's official authority, from effecting an arrest by: 1) Using or threatening to use physical force against the peace officer or another; or 2) Using any other means creating a substantial risk of causing physical injury to the peace officer or another. A.R.S. § 13-2508 (emphasis added).

As one of my old law professors used to yell, "Show me the language!" More instructive than the language of the statute, though, is the language of the jury instruction pertaining to resisting arrest set forth in the Revised Arizona Jury Instruction:

> The crime of resisting arrest requires proof of the following four things:
>
> 1. A peace officer, acting under official authority, sought to arrest either the defendant or some other person; and
>
> 2. The defendant knew, or had reason to know, that the person seeking to make the arrest was a peace officer acting under color of such peace officer's official authority; and
>
> 3. The defendant intentionally prevented or attempted to prevent the peace officer from making the arrest; and
>
> 4. The means used by the defendant to prevent the arrest involved either the use or threat to use physical force or any other substantial risk of physical injury to either the peace officer or another.
>
> Whether the attempted arrest was legally justified is irrelevant.
>
> 25.08, Revised Arizona Jury Instruction 3rd.

The first requirement is that the client must intentionally prevent or intentionally attempt to prevent an arrest. The state must prove beyond a reasonable doubt that the client's state of mind was that his actions were intended to prevent the arrest from occurring.

The second requirement is that the client must have reasonably known that the person he was dealing with was a peace officer.

The third requirement is that the peace officer must have been acting under the color of his official authority.

The fourth requirement is the most important to consider. The peace officer must have been effecting an arrest. Notice how the statute does not say "investigative detention" or "*Terry* stop." This language also puts a short time window on when resisting arrest can take place. Resisting arrest can only take place when the officer is effecting, or, if you look at the RAJI, attempting to make an arrest. The courts have defined more specifically when the window opens.

In *State v. Womack*, 174 Ariz. 108 (App. Div.1 1992), the Court of Appeals considered whether a person fleeing on a motorcycle, who is being pursued for not having a taillight, is resisting arrest. The court held that, in order to resist arrest, the person who is supposedly resisting must know that what they are resisting is an arrest. *Id.* at 114. This requires some communication by the officers to the person that they are attempting to arrest. The court questioned "whether the defendant could be guilty of resisting something that did not then exist", and its answer was, "We think not." *Id.* In order to resist arrest, there has to be an arrest, i.e. an intent to arrest that is communicated to the person the police are attempting to arrest, or a situation which a reasonable person would believe is an arrest. *Id.* This ties in to the first requirement of intent. I suggest the following jury instruction:

Intent to Resist Arrest

> A person cannot have intent to resist an arrest before the peace officer has informed the person that there is an intent to arrest him. A person can be informed of the peace officer's intent to arrest through words or actions.
>
> **Source:** A.R.S. 13-2508; *State v. Womack*, 174 Ariz. 108 (App.Div.1 1992).

As a window can open, it also can close. Because resisting arrest can only occur while the arrest is being effected or attempted, once the arrest is successful, it cannot be resisted. What constitutes an effected arrest was the subject of *State v. Mitchell*, 204 Ariz. 216 (App. Div.1 2003). The *Mitchell* Court explained, "[e]ffecting an arrest is a process with a beginning and an end. Often, the process is very brief and the arrest is quickly completed. In some situations, however, the process of 'effecting' an arrest will occur over a period of time and may not be limited to an instantaneous event, such as handcuffing." In *Mitchell*, the defense argued that once the accused was handcuffed, the arrest was completed; therefore, the jury could not lawfully find that the accused resisted arrest.

The *Mitchell* court rejected the defendant's argument to the extent that it suggested that imposing actual restraints (e.g., handcuffs) closes the window on resisting arrest; the Court held that a reasonable jury could find that the process of effecting an arrest was ongoing where only a few seconds had passed between the handcuffing and the violent struggle. The Court indicated that the time that an arrest has been effected will be evaluated on a case-by-case basis. The Court left open the possible argument that a person who struggles more than a few seconds after being handcuffed is not committing a resisting arrest. Any activity by your client after the arrest has been effected may be another crime, but it may not be resisting arrest. I suggest the following jury instruction:

Completion of Arrest

> In order to resist arrest, a peace officer must be attempting to arrest the person. Once the police have succeeded in effecting the arrest of that person, the person's conduct does not constitute resisting arrest.
>
> **Source:** A.R.S. 13-2508; *State v. Mitchell*, 204 Ariz. 216 (App.Div.1 2003*); State v. Womack*, 174 Ariz. 108 (App.Div.1. 1992).

The final requirement is also one to examine closely. Depending on the way that the Resisting Arrest is charged, A.R.S. § 13-2508 requires that there be either a use or threat of physical force under (a)(1), or a substantial risk of causing physical injury (a)(2). Albeit in *dicta*, *In re Jessi W.*, 214 Ariz. 334, 336-37 (App. 2007), states that the defendant must intend to use or threaten force against the officer, and it also states that the accused must intend that the officer is subjected to a substantial risk of physical injury. In other words, it is not enough that your client's conduct put the officer in substantial risk, provided that the state cannot show that the client purposefully put the officer in this position. If your client's actions may have unintentionally put the officer at substantial risk of physical injury, you should request the Court to modify the RAJI to reflect that your client can only be guilty of Resisting Arrest if he intended the officer to be in substantial risk of physical injury.

Another important aspect of this final requirement is the difference between avoiding arrest and resisting arrest. When an individual is being arrested, the individual may submit to the arrest, avoid the arrest, or resist the arrest. Only the latter constitutes the statutory offense of resisting arrest. *See Womack*, 174 Ariz. at 112. "One who runs away from an arresting officer or who makes an effort to shake off the officer's detaining arm might be said to obstruct the officer physically, but this type of evasion or minor scuffling is not unusual in an arrest, nor would it be desirable to make it a criminal offense to flee an arrest." *Id.* at 111, *citing* Haw. Rev. Stat. § 710-1026 cmt. (1985).

The *Womack* court made a determination of the legislature's intent with regard to Section 13-2508:

> That intent, as we glean it from the statute, is to prohibit threats or any conduct that creates a substantial risk of injury to another, including the officer. As we read the statute, it prohibits assaultive behavior directed toward an arresting officer, not an arrestee's efforts to put as much distance as possible between himself and the officer. *Id.* at 111.

Simply put, if your client did not assault the officer, his behavior does not likely amount to resisting arrest. What we usually see in our resisting arrest cases are clients who pull their hands in front of them to avoid being handcuffed, or who try to shake the officer's hands off them. This type of behavior just does not rise to the level of "assaultive behavior" that is required for resisting arrest. This type of behavior, with the addition of other circumstances, though, can rise to the level of resisting arrest. I suggest the following jury instructions:

Avoiding, Not Resisting, Arrest

> One who runs away from a peace officer attempting to make an arrest, or one who makes an effort to shake off a peace officer's arm is not resisting arrest. Mere non-submission is not resisting arrest. The state must prove, beyond a reasonable doubt, that the defendant engaged in assaultive behavior with the intent to prevent an arrest. If the state is unable to prove this, you must find the defendant not guilty.
>
> **Source:** A.R.S. 13-2508; *State v. Womack*, 174 Ariz. 108 (App.Div.1. 1992).

Defense to Resisting Arrest

> Mere argument with or criticism of a peace officer is not sufficient grounds, without more, to find a person guilty of resisting arrest.
>
> **Source:** A.R.S. § 13-2508; *State v. Tages*, 10 Ariz. App. 127, 457 P.2d 289 (1969); *State v. Snodgrass*, 117 Ariz. 107, 570 P.2d 1280 (App. 1977); *State v. Snodgrass*, 121 Ariz. 409, 590 P.2d 948 (App. 1979).

25.081, RAJI 3rd.

The prosecutor's response to your Womack argument will probably be based on *State v. Henry*, 191 Ariz. 283 (App. Div.1 1997). In *Henry*, officers attempted to stop a car for expired license plates. The driver of the car refused to stop, and the officers pursued. Eventually, the car stopped and the driver fled on foot. One of the officers caught up to the defendant and forced him to the ground. The defendant refused to be handcuffed by squirming and tucking his arms underneath his body. He also shouted to bystanders to get the officer off his back. This prompted several people in the crowd to approach the officer and someone threw a beer bottle that shattered and sprayed glass on the officer. The defendant and the crowd were subdued with pepper spray. Other officers arrived and took the defendant into custody. The defendant was charged with unlawful flight and resisting arrest. A jury found him guilty of resisting arrest. The Court of Appeals held that the conviction was supported by the evidence, stating:

> "The Defendant forcibly resisted being handcuffed which was an attempt to prevent the officer from taking him into custody. The crowd, at the Defendant's behest, also intervened with the same purpose and in a manner that created a risk of injury to the officer. All of this clearly supports the conviction for resisting arrest." *Id.* at 285.

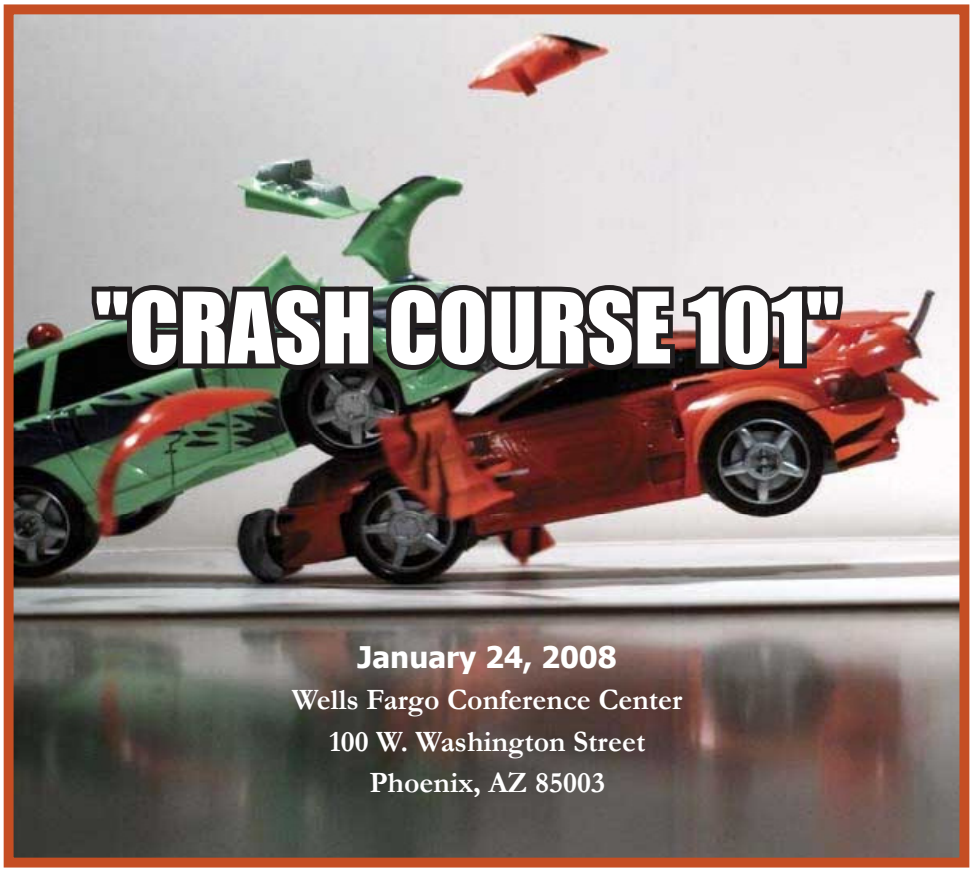
The holding in *Henry* is very narrow. The court seems to make a totality of the circumstances analysis. The totality of the circumstances involves not just the defendant putting his arms underneath his body, but also prompting a crowd to attack the officer. While it is difficult to see how putting one's arms underneath one's body to avoid being handcuffed creates a "substantial risk of causing physical injury to a peace officer or another," it is not difficult to see how prompting a crowd (depending on the crowd, of course) to attack an officer does create such a risk. Unless the facts in your case are similar to the facts in Henry, you should be able to distinguish *Henry*.

So what should a defense attorney look for when presented with a resisting arrest case? Did the client commit an assault against the officer? Did the assault occur after a reasonable person would believe an arrest was being attempted, but before the arrest was completed? Was there even an arrest, or was the officer attempting to put the client in investigative detention? Obviously, your factual analysis of a case should run deeper than these three questions, but these questions are a good place to start.

Conclusion

There is a narrow time window in which a person can commit the offense of resisting arrest. Furthermore, the type of behavior that constitutes resisting arrest has to be more than mere non-submittal or avoidance. The behavior required for a person to commit resisting arrest is assaultive behavior directed towards law enforcement officers. Anything less than this may be annoying and a nuisance to the police, but it is not resisting arrest.

January Seminars



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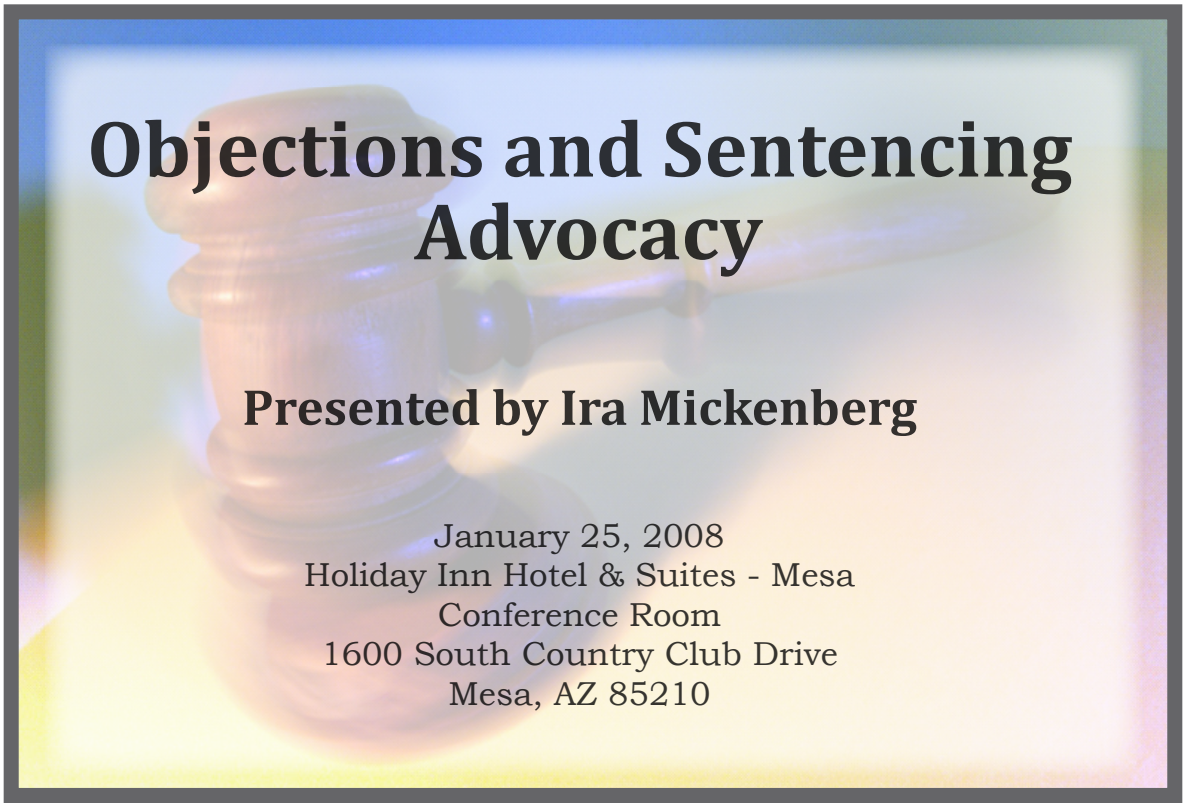


Fighting the State's Attempt to Reopen After a Rule 20 Motion

By Joel Feinman, Pima County Assistant Public Defender

For many new public defenders, college bull sessions and law school happy hours introduce us to the world of righteous indignation. But I doubt many of us previously experienced the same cheek-flushing, palm-sweating, octave-jumping incensement we felt when we first discovered just how much the state is allowed to get away with.

I had my moment in November. Terry Bublik, a trial group supervisor in the Maricopa County Public Defender's Office, told a group of new attorneys about one of her murder trials, in which the judge had allowed the state to reopen its case and introduce brand new substantive evidence after Terry made a Rule 20 motion demonstrating just how hollow the prosecution's evidence was. After the training session, I approached MCPD Training Director Dan Lowrance and MCPD Attorney Russ Born confused and furious. "Dan," I half-whined, "How can they doooo that?! It's not fairrrrr!" Dan and Russ Born assured me that it was not fair, that it had been fought many times, and that judges nevertheless do it all the time. Thankfully, while three weeks into the job the finer points of constitutional law continued to elude me, my third-grade conception of "fairness" remained. So I did some research on the issue, and came up with a strategy I plan to use when the state moves to reopen in one of my cases.

I. Argue that allowing the state to reopen would be a deprivation of the client's substantial rights.

Arizona courts have long held that rulings on motions to reopen are left to the sound discretion of the trial court. *State v. Moreno*, 92 Ariz. 116, 118, 374 P.2d 872, 873 (Ariz. 1962). An oft-cited phrase employed to emphasize the trial court's power to allow the state leave to reopen, especially when they have failed to prove a "technical" element in their case-in-chief, is that the "rules of criminal procedure should be construed so as to promote justice—not to thwart it." *State v. Cassady*, 67 Ariz. 48, 55-56, 190 P.2d 501, 506 (Ariz. 1948). Thus the denial or granting of motions to reopen will not be disturbed on appeal absent a showing of abuse of discretion. *Moreno*, 92 Ariz. at 118, 374 P.2d at 873.

The Supreme Court has determined that an abuse of discretion occurs when the defendant was so prejudiced when the trial court allowed the state to reopen its case, that the ruling deprived the defendant of a "substantial right." *State v. Cota*, 99 Ariz. 237, 241, 408 P.2d 27, 29 (Ariz. 1965); *a'ffd*, *State v. Patterson*, 203 Ariz. 513, 514, 56 P.3d 1097, 1098 (Ariz.App. 2002). For appellate purposes, errors that effect "substantial rights" are errors that prejudice, injure, or influence the outcome of the trial. *U.S. v. Dominguez-Benitez*, 542 U.S. 74, 81, 124 S.Ct. 2333, 2339 (2004); *Kotteakos v. U.S.*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253 (1946).

When the state is granted leave to reopen its case after a Rule 20 motion, allowing the prosecutor to present additional evidence is practically guaranteed to influence the outcome of the trial. For if a Rule 20 motion would be granted and the charges dismissed but for the new evidence, and that evidence is what sends the matter to a jury and leads to a conviction, the client has absorbed the ultimate prejudice and injury. They would quite literally be free if the trial court had not erred in allowing the state to reopen its case. This begs the question, when is it error for the trial court to grant the state leave to reopen?

II. It is error for the Court to allow the state to reopen to correct a "major variance" it knew about after the defense has presented its case-in-chief.

In *State v. Cousins*, 4 Ariz.App. 318, 420 P.2d 185 (Ariz.App. 1966), the Defendant was charged with four counts of perjury relating to a previous trial for leaving the scene of an accident and DUI. At the perjury trial, the state called witnesses to establish, among other things, the date of the traffic accident. Five state witnesses claimed that the accident occurred on the 4th or 5th of November, 1964. A sixth witness, the assistant city attorney who prosecuted the original traffic case, testified for the state that the accident occurred on the 4th or 5th of October, 1964, not November.

After the state rested in the perjury trial, the defendant moved for a directed verdict, pointing out the discrepancy in dates and urging a material variance. The deputy county attorney acknowledged the evidentiary variance, but chose to stand on the record without seeking leave to reopen at that time. The defense's motion for a directed verdict was denied.

In its case-in-chief, the defense presented evidence that it was not possible for the accident to have happened in November. After the defense rested and over its objection, the state was granted leave to reopen, recalled the witnesses who testified that the accident occurred in November, and now elicited testimony from these same witnesses that the accident occurred in October.

On appeal, the Court of Appeals determined that, at the time the state closed its case-in-chief, the record showed a "material variance." *Cousins*, 4 Ariz.App. at 323, 420 P.2d at 190. If the defense had rested instead of presenting its own evidence, the defendant "could have been convicted of an offense which he did not commit," namely, falsely testifying as to an event that may not have occurred, and in connection with a trial that did not charge him with the events testified to in the state's case. *Cousins*, 4 Ariz.App. at 323, 420 P.2d at 190.

The Court of Appeals continued on to acknowledge the trial court's broad discretion to allow the state to reopen its case, but then determined that this discretion "was erroneously exercised." The prosecutor knew of the major evidentiary variance at the close of his case-in-chief, and elected to stand on it. In doing so the state "forced" the defense to make the crucial tactical decision to discredit the state's witnesses as to the date of the events. It was only after the defense did so successfully that the state grew insecure, and decided that, contrary to its earlier position, the variance warranted rebuttal through new, substantive evidence. The trial court's decision to allow the state to reopen its case and present this evidence was error. *Cousins*, 4 Ariz.App. at 324, 420 P.2d at 191.

III. It is error for the trial court to deny the defense a full and fair opportunity to rebut additional evidence presented by the state after the prosecutor is permitted to reopen their case.

In *State v. Dickens*, 187 Ariz. 1, 926 P.2d 468, (Ariz. 1996), the state moved to reopen its case after the defense made a Rule 20 motion, in order to call a co-conspirator to testify against the defendant. The trial judge initially denied the motion, then granted it on reconsideration, and recessed for one week to allow the defense time to take the co-conspirator's deposition and prepare for his testimony.

The Supreme Court upheld the trial court's ruling, and stated that, even if the Defense was surprised by some of the co-conspirator's testimony, they could have anticipated and inquired about this testimony during the week-long recess. "[T]here is no prejudicial error when a defendant is given a full and fair opportunity to rebut the additional evidence." *Dickens*, 187 Ariz. 1, 13, 926 P.2d 468, 480 (Ariz. 1996); *citing Cota*, 203 Ariz. at 241, 408 P.2d at 29.

While the *Dickens* Court did not explicitly state the converse of this ruling, denying the Defense an opportunity to rebut additional evidence would logically follow as an abuse of discretion that denies the defendant their substantial rights.

Practice Tip: *To preserve the issue of untimeliness, object if the trial judge tries to reserve judgment on a Rule 20 motion, even if only for a lunch break.*

In *Dickens*, after the defense made its Rule 20 motion, the judge heard arguments then decided to take the matter under advisement. The defense did not object to the delay.

On appeal, the Supreme Court ruled that this delay did not violate Rule 20 partly because the defendant "failed to object to the judge's decision to reserve his ruling until the following day." *Dickens*, 187 Ariz. at 12, 926 P.2d at 479. The Court noted that Rule 20 specifically states that the court's decision on the motion "shall not be reserved, but shall be made with all possible speed." However, *Dickens* cited with approval a Court of Appeals decision holding that the defense waives any untimeliness objections if counsel does not object or request a timely ruling when they first make their Rule 20 motion. *Dickens*, 187 Ariz. at 12, 926 P.2d at 479; *citing State v. James*, 175 Ariz. 478, 478, 857 P.2d 1332, 1332 (Ariz.App. Div. 2, 1993).

Both the Rule and the Supreme Court favor a quick decision on Rule 20 motions. In practice, forcing judges to make their rulings on the spot may well cause them to deny motions they think have merit, for when they are on the hot seat they are more likely to opt for caution and conservatism. However, as *Dickens* and *James* made clear, not immediately objecting to untimeliness waives the issue on appeal. This places defense counsel in the difficult position of wanting to make a good record on the one hand, but without pressuring the trial court into a hasty, unfavorable ruling on the other. It may come down to case-by-case tactics, requiring defense counsel to decide which avenue will prove more valuable.

IV. It is error for the trial court to allow reopening after jury deliberations have begun.

The case law supporting this proposition is older, and based on federal rather than Arizona law. However, it does provide good language to fight attempts to reopen made after the jury begins their deliberations.

In *Eason v. U.S.*, 281 F.2d 818 (9th Cir. 1960), the defendant was charged with illegal importation of narcotics into the U.S. After the jury retired to deliberate, they sent the trial judge a question, asking if the car the defendant drove into the U.S. had a visible registration certificate. The jury was informed that the defendant was the undisputed owner of the car, and that there was no testimony either way that the car had a registration certificate. The defense then sought to reopen the trial so the defendant could testify that a temporary registration certificate had been pasted to the windshield of the car when the car had been taken at the border, and that the certificate had not been on the car when it had been viewed by the jury. The trial court denied the defense's motion to reopen, and the 9th Circuit held that this denial did not constitute an abuse of discretion. The Court stated that, "[R]eopening a case for the purpose of introducing overlooked evidence must be done with extreme reluctance because of the undue emphasis given to the introduced evidence with consequent distortion of the evidence as a whole and the possibility that such prejudice will result to the other party as to require a mistrial." *Eason*, 218 F.2d at 822.

The 9th Circuit cited as justification a U.S. Supreme Court decision, *U.S. v. Bayer*, 331 U.S. 532 (1947), in which the defense had also tried to reopen the case to introduce new evidence after jury deliberations began. The Supreme Court held that the trial court properly denied the defense leave to reopen its case, stating, "The evidence, if put in after four hours of deliberation by the jury, would likely be of distorted importance. It surely would have been prejudicial to the Government, for the District Attorney would then have had no chance to comment on it, summation having been closed…The court seems to have faced a dilemma, either to grant a mistrial and start the whole case over again or to deny the [Defendant's] request. Certainly a defendant who seeks thus to destroy a trial must bring his demand within the rules of proof and do something to excuse its untimeliness." *Bayer*, 331 U.S. at 538.

Both *Eason* and *Bayer* speak to a defendant's attempts to reopen after jury deliberations have begun. However, the 9th Circuit's "extreme reluctance" to allow the introduction of overlooked evidence at the deliberations stage, and the Supreme Court's concern about prejudicing the opposing side should apply at least equally when it is the state that seeks leave to reopen, jeopardizing the defendant's all-important, constitutionally-protected trial rights.

V. The Big One: Connecticut has held that it is error for the trial court to allow the state to reopen to prove up a missing essential element specifically identified by the defense in its motion for a judgment of acquittal.

The most comprehensive legal authority defense counsel can employ to fight the state's attempts to reopen was handed down by the Connecticut Supreme Court in 1987. In *State v. Allen*, 205 Conn. 370, 533 A.2d 559 (Conn. 1987), the Court held that "when the state has failed to make out a prima facie case because insufficient evidence has been introduced concerning an essential element of a crime and the defendant has specifically identified this evidentiary gap in a motion for judgment of acquittal, it is an abuse of the trial court's discretion to permit a reopening of the case to supply the missing evidence." *Allen*, 205 Conn. at 385, 533 A.2d at 566.

In *Allen*, the Defendant was convicted of 1st degree assault, assault on a police officer, attempted murder, and having a weapon in a motor vehicle. As to the last count, the state charged the defendant with knowingly having a "pistol" in his car without a permit. After the state rested its case, the defense moved for a judgment of acquittal on the charge of having a weapon in a motor vehicle, and argued that the state had failed to establish that the weapon was a pistol within the meaning of the statute by failing to offer any evidence as to the length of the weapon's barrel. (The governing Connecticut statute defined a "pistol" as "a firearm with a barrel less than twelve inches in length.")

The state claimed that no definition of "pistol" need apply to the case, and that having any firearm in a car without a permit violated the statute the defendant was charged under. The trial court denied the defendant's motion for acquittal.

However, after having a night to consider its position, the next day the state moved to reopen its case in order to present evidence on the length of the gun's barrel. The state still maintained that the defense's argument was incorrect, but it was "hedging [its] bet" in case the Supreme Court determined on appeal the statutory definition of "pistol" should in fact apply. *Allen*, 205 Conn. at 374, 533 A.2d at 561. The trial court permitted the state to reopen its case, and present evidence on the gun's barrel length. After the defendant was convicted, the Connecticut Court of Appeals held that the trial court did not abuse its discretion when it denied the defendant's motion for acquittal and allowed the state to reopen.

The Connecticut Supreme Court reversed, and remanded the case to the trial court with direction to render a judgment of acquittal on the charge of having of weapon in a motor vehicle. It is notable—and extremely helpful—that the Connecticut Supreme Court did not refer to unique state law in coming to its decision, but instead relied on fundamental federal constitutional principles.

The Supreme Court noted that the state has the burden of proving every element of an alleged crime beyond a reasonable doubt. *Allen*, 205 Conn. at 376, 533 A.2d at 562; *citing In re Winship*, 397 U.S. 358, 364 (1970). A criminal defendant has the absolute right to hold the state to this burden, and "need not defend until and unless the state has presented a prima facie case." *Allen*, 205 Conn. at 376, 533 A.2d at 562. Indeed, according to the Court, one of the "greatest safeguards for the individual under our system of criminal justice" is the requirement that "the prosecution must establish a prima facie case by its own evidence before the defendant may be put to his defense." *Allen*, 205 Conn. at 376, 533 A.2d at 562.; *U.S. v. Wiley*, 517 F.2d 1212, 1218-1219 (D.C.Cir. 1975).

If the defendant in *Allen* had not made a motion for judgment of acquittal, and remained silent on the state's failure to prove an essential element of the offense, a judgment of acquittal would nevertheless have been required either in the trial court or on appeal. *Allen*, 205 Conn. at 376, 533 A.2d at 562. Refusing to grant the motion for a judgment of acquittal would have deprived the defendant of his "fundamental constitutional right" under *Winship* to have state prove every element of the crimes alleged. *Id.*

Allen explicitly affirmed that trial courts enjoy wide discretion to permit the reopening of a case after either side has rested, especially when "mere inadvertence or some other compelling circumstance" justifies such a decision. *Allen*, 205 Conn. at 380, 533 A.2d at 564. However, the Court also noted the importance of the moment when the state chooses to rest its case-in-chief, and how, by making this decision, the state voluntarily ceases to introduce evidence, and loses the right to introduce fresh evidence except in rebuttal. *Allen*, 205 Conn. at 379, 533 A.2d at 563. Additionally, the Court agreed with a prior statement made by the U.S. 10th Circuit that "the government's case-in-chief should not be treated as an experiment that can be cured after the defendant has, by motion, identified the failures." *Allen*, 205 Conn. at 380, 533 A.2d at 564; *quoting U.S. v. Hinderman*, 625 F.2d 994, 996 (10th Cir. 1980).

Crucially, *Allen* recognized that giving the state the opportunity to reopen its case, after a defendant identifies a missing essential element and moves for a judgment of acquittal, allows the defendant to be "effectively victimized by his own diligence as the state used the reopening to supply the missing element of the crime, thus assuring the defendant's conviction." *Allen*, 205 Conn. at 378, 533 A.2d at 563. The Court continued to note that, "If we hold that it is not an abuse of discretion to allow the state to supply evidence of a missing element of a crime identified by the defendant in his motion for judgment of acquittal after the state has rested, would any competent defense attorney ever make such a motion again?... Rather than make this motion at the close of the state's case or even at any time before the jury has rendered a verdict, the defendant would be well advised to wait to make his constitutional claim on appeal." *Allen*, 205 Conn. at 378-379, 533 A.2d at 563. Such an outcome would directly contradict a core concern of the U.S. judicial system, which "should encourage litigants to raise objections at the earliest rather than the last possible time." *Allen*, 205 Conn. at 379, 533 A.2d at 563; *citing U.S. v. Tateo*, 377 U.S. 463, 468 n. 4 (1964).

Allen is a tremendously helpful decision to criminal defendants. It prevents the state from being able to prove up essential elements that a prosecutor overlooked or ignored in their case-in-chief, and ensures that a negligent prosecutor is not allowed to profit off of defense counsel's diligence. Finally, *Allen* can easily be cited and argued outside of Connecticut. The Connecticut Supreme Court did not rely on unique local jurisprudence in formulating its ruling, but based all of its reasoning on U.S. constitutional guarantees.

While Arizona courts have not followed *Allen*, they have not rejected it either. A Westlaw search of reported Arizona cases did not reveal a single case discussing or even citing the *Allen* holding. Consequently, *Allen* can be a persuasive tool to employ when a defendant's Rule 20 motion specifically identifies an essential element that the state failed to prove up by prima facie evidence in its case-in-chief.

Clearly, any argument relying on *Allen* will face an uphill battle. It will have to contend with decades of Arizona case law holding that trial courts have sound discretion to allow the state to reopen, and that reopenings should be liberally granted to promote justice. But, and this is crucial, it shouldn't be forgotten that *Allen* restated these concerns, affirmed their basic soundness, then held that these principles do not trump a criminal defendant's basic constitutional right to have the state properly prove up the charges against them.

Jury and Bench Trial Results
October 2007

Public Defender's Office

Dates: Start - Finish	**Attorney** Investigator *Paralegal*	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group 1						
9/21 - 10/2	**Stewart Hann** O'Farrell *Kunz*	Steinle	Bonaguidi	CR06-119265-001DT TOMOT, F3	Guilty	Jury
10/1 - 10/2	**Smith Davis** Rankin *Curtis*	Lynch	Hernacki	CR07-116651-001DT Forgery, F4	Directed Verdict	Jury
Group 2						
10/1 - 10/2	**DeLaTorre** Thompson *Curtis*	Blomo	Willison	CR07-118104-001DT MIW, F4	Not Guilty	Jury
10/23 - 10/25	**Scott** Urista	Mroz	Harames	CR05-006291-001DT POND, F4	Not Guilty	Jury
10/24 - 10/25	**Kephart** Romani	O'Conner	Schultz	CR07-125091-001DT TOMOT, F3 Unlawful Use of Means of Transportation, F5	Not Guilty	Jury
10/3 - 10/4	**Kephart Rosell**	Houser	Allen Jones	CR07-110183-001DT Burgl. 2nd Deg., F4 Theft, M1	Mistrial	Jury
10/16 - 10/23	Lee	Lynch	Okano	CR07-135125-002DT Armed Robbery, F2 TOMOT, F3	Not Guilty	Jury
Group 3						
10/1 - 10/5	**Traher** Charlton *Browne*	Mahoney	Church	CR06-012902-001DT Cruelty to Animals/Poultry, F6	Not Guilty	Jury
10/15 - 10/18	**Jackson** Burgess *Browne*	Donahoe	Matsuno	CR07-133208-001DT Agg. Assault, F6	Not Guilty	Jury
Group 4						
9/25 - 9/27	**Engineer**	Sanders	Kelly	CR07-115824-001SE PODD, F4 PODP, F6	Guilty	Jury
10/1 - 10/4	**Lockard**	Contes	Rodriguez	CR07-113838-001SE Forgery, F4	Guilty	Jury
10/1 - 10/5	**Nurmi** Arvanitas *Cowart*	Abrams	Baker	CR06-167239-001SE Kidnap, F2 2 cts. Sexual Assualt, F2	Not Guilty	Jury
10/11 - 10/16	**Akins**	Arellano	Smith	CR07-030017-001SE Agg. Assault, F3D Criminal Damage, F6	Agg. Assault-Guilty; Criminal Damage-Dismissed w/o prejudice day of trial	Jury

Jury and Bench Trial Results
October 2007

Public Defender's Office

Dates: Start - Finish	**Attorney** Investigator *Paralegal*	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group 4 (Continued)						
10/17 - 10/19	**Dehner**	Contes	Rodriguez	CR06-172778-001SE Robbery, F5	Not Guilty	Jury
10/22 - 10/29	**Antonson**	Sanders	Linn	CR06-165173-004DT PODD, F4 POM, F6 PODP, F6	PODD-Not Guilty POM-Guilty PODP-Guilty	Jury
Vehicular						
10/09 - 10/10	**Conter**	Lynch	McDermott	CR2006-177403-001 DT 2 cts. Agg. DUI, F4 Unlawful Flight, F5	2 cts. on Agg. DUI, guilty; Unlawful Flight dismissed by prosecution	Jury
10/10 - 10/16	**Taylor** Rankin *Ralston*	Harrison	Vescio	CR2007-048251-001 DT TOMOT, F3 Burg. 3rd Deg, F5 Criminal Damage, F4	TOMOT - guilty lesser included, Att. Burg. 3rd Deg. -guilty, Criminal Damage - Guilty	Jury
10/10 - 10/18	**Grashel** Ryon *Renning*	Anderson	Adel	CR2007-007319-001 DT Hit & Run 1/Death & Injury, F4	Guilty	Jury
10/15 - 10/16	**Timmer**	Passamonte	McGary	CR05-138832-001 DT 2 cts. Agg. DUI, F4	Guilty	Jury

Jury and Bench Trial Results
October 2007

Legal Defender's Office

Dates: Start - Finish	**Attorney** Investigator *Paralegal*	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
9/5	**Garfinkel**	Hannah	Hunter	JD15512 Dependency / Severance Trial	Dependency Found / Severance Granted	Bench
9/7	**Shanahan**	Oberbillig	Herrera-Gonzales	JD506387 Severance Trial	Severance Granted	Bench
10/2	**McGuire**	Owens	Tinsley	JD506894 Dependency Trial	Dependency Found (on 1 of 3 children)	Bench
10/2 - 10/3	**Gaunt**	Davis	AG	JD14737 Severance Trial	Severance Granted	Bench
10/2 - 10/16	**Carlson**	Klein	Oberpriller	CR07-115536-001DT 4 cts Armed Robbery, F2D 5 cts Kidnapping, F2D Burglary 1, F2D Burglary 1, F3D Agg. Assault, F3D	Guilty: 4 cts, Armed Robbery, F2D; 5 cts Kidnapping, F2D; Burglary 1, F2D Burglary 1, F3D Not Guilty: Agg Assault, F3D	Jury
10/3 - 10/10	**McWhirter**	Duncan	Buesing	CR07-126655-001DT 2 cts, Agg. Assault, F3D Misconduct Involving Weapons, F4 Forgery, F4 Interfer. w/Judicial Proceeding, M1	Guilty	Jury
10/4	**Gaunt**	Brodman	AG	JD14756 Severance Trial	Severance Granted: Client consented	Bench
10/5	**Garfinkel**	McClennen	Van Doren	JD14793 Severance Trial	Severance Granted	Bench
10/5	**Shanahan**	Oberbillig	Villanueva	JD506273 Severance Trial	Severance Granted	Bench
10/11 - 10/18	**Sanders**	Bergin	AG	JD14724 Severance Trial	Severance Granted	Bench
10/12	**Ripa**	Gama	AG	JD15610 Dependency Trial	Dependency Found: Failure to appear	Bench
10/12 - 10/16	**Bogart** McReynolds	McMurdie	Shipman	CR07-133096-001DT PONDs for sale, F2	Guilty of lesser POND	Jury
10/16	**Ripa**	Brodman	AG	JD15291 Severance Trial	Severance Granted: Client defaulted	Bench
10/25	**Garfinkel**	Bergin	Linnons	JD15057 Severance Trial	Severance Granted	Bench

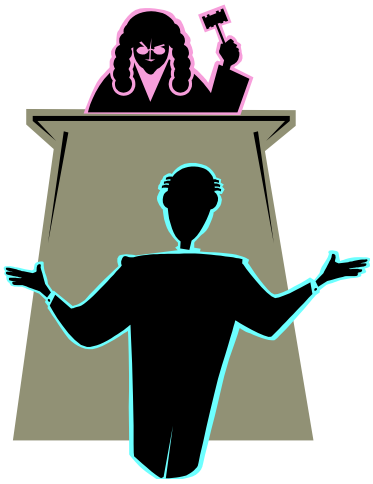
Jury and Bench Trial Results
October 2007

Legal Advocate's Office

Dates: Start - Finish	**Attorney** Investigator *Paralegal*	Judge	CR# and Charges(s)	Result	Bench or Jury Trial
10/3 - 10/18	**Schmich** Mullavey Prieto Stovall	Mroz	CR2005-133174-001-DT; 5 Cts of Sex Cond w/Minor-F2; 3 Cts of Sex Abuse-F3; 1 Ct Molest. of Child-F2	Guilty on All Counts	Jury
10/22 - 10/30	**Romberg**	Grant	CR2007-103866-003-DT; 1 Ct. Agg. Ass.-F3; 1 Ct. MIW-F4	Guilty on All Counts	Jury
8/3 - 10/4	**Todd**	Talamante	JD504497 - Severance	Awaiting Decision	Bench
8/27 - 10/12	**Stubbs** Contreras	Talamante	JD-506751 - Dependency	Dependency Found	
10/16	**Christian** Christensen	Hoag	JD-506520 - Dependency	Dependency Found	Bench
10/17 - 10/24	**Owsley** Marrero	McClennen	JD-14471 - Severance	Severance Taken Under Advisement	Bench
10/22	**Owsley** Marrero	Davis	JD-14172 - Severance	Severance Granted	Bench
10/30	**Lunde** Contreras	Gama	JD-14768 - Severance	Severance Granted	Bench

OBJECTIONS SEMINAR

THE ARIZONA FEDERAL DEFENDER'S OFFICE AND MARICOPA COUNTY PUBLIC DEFENDER'S OFFICE



Friday, April 18, 2008
9:00 am – 4:30 pm
(Check in begins at 8:30 am

Downtown Justice Center
620 West Jackson
2nd Floor Training Room

- Helpful Exercises on Using Objections as Sword and Shield
- Review Evidentiary Rules
- Put Evidentiary Rules into Practice
- Interactive Lectures and Small Group Workshops

This workshop may qualify for up to 5.5 hours of CLE with 1 hour of Ethics

This seminar will follow up on the Ira Mickenberg Objections and Sentencing Advocacy Seminar. It will be a hands-on, small group, highly interactive seminar for new attorneys who want to sharpen their objection skills.

For Registration Information, contact Celeste Cogley at 602-506-7711, ext 37569 or cogleyc@mail.maricopa.gov

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